Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

JERRY L. BRANCH, COLBY L. BRANCH, and VALENNA L. BRANCH BECKER,

Petitioners,

v.

DALE L. TUNNELL, Individually and as Special Agent of Bureau of Land Management,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a heightened pleading standard to be applied to non-*Monell* allegations made in a *Bivens* action in which subjective intent is an element of a constitutional tort, so that the pleader must state in his or her complaint non-conclusory allegations setting forth evidence of unlawful intent?

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Jerry L. Branch, Colby L. Branch, and Valenna L. Branch Becker all petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, 1a- 19a), is reported at 1994WL5494 (January 12, 1994, and the prior opinion in this same case, on which the

opinion of which review is sought is based (App. B, *infra*, 1b- 15b), is reported at 937 F.2d 1382 (9th Cir. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1994. F.R. App. P. (West 1993) Rule 36. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 8(a), Federal Rules of Civil Procedure (West 1993), in pertinent part, provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

Rule 9(b) provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge, and other condition of mind* of a person *may be averred generally.*

(Emphasis added.)

STATEMENT

Petitioners' home and office were searched after respondent sought and obtained warrants from a United States Magistrate. The warrants were executed on July 16, 1987, and no criminal charges were filed against any petitioner after their home and office were searched.

Petitioners brought a *Bivens*[1]-type action against respondent, and in their complaint alleged that their rights under the Fourth and Fourteenth Amendments to the Constitution of the United States had been violated by respondent, who, it is alleged, used the warrant as a pretext to secure documents from petitioners that were confidential corporate documents. Petitioners claimed the information submitted by respondent to obtain the warrant was false and unsubstantiated.

Respondent moved to dismiss the complaint, that motion was denied by the district court, and then the Court of Appeals reversed the denial of the motion to dismiss, holding that (1) "[w]e . . . adopt a heightened pleading standard in cases in which subjective intent is an element of a constitutional action. We hold that in order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent[,]" 937 F.2d at 1386, and (2) "[b]ecause a defendant's entitlement to qualified immunity in a *Bivens* or § 1983 action alleging judicial deception turns on the ability of the plaintiff to establish that

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[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)

the defendant knowingly or recklessly misled the magistrate [citations omitted], we find that the heightened pleading standard must be satisfied." *Id.* at 1387. The action was remanded in order to allow the petitioners an opportunity to amend their complaint in light of the new, heightened pleading standard adopted by the Court of Appeals.

Petitioners repled on remand, and the district court, applying the new, heightened pleading standard adopted in this case, dismissed the complaint on respondent's motion. Petitioners appealed and the Court of Appeals upheld that dismissal. 1994WL5496 (January 12, 1994). It held:

> Because the [Supreme] Court in *Leatherman* [*v. Tarrant County Narcotics Unit,* 113 S. Ct. 1160 (1993)] expressly stated it was not deciding whether federal appeals courts may employ a heightened pleading standard in qualified immunity cases, we are bound by our holding in *Branch I.*
>
> . . . .
>
> [W]e must consider Branch's argument that we should overrule that opinion [in *Branch I*] in light of *Leatherman.* We agree with Branch that if his amended complaint is reviewed under the familiar standard of *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) . . . that pleading suffices for Rule 12(b)(6) purposes. We disagree, however, that we are free to revisit *Branch I* in light of *Leatherman.*
>
> . . . .
>
> Because of the [Supreme] Court's caveat, we lack the authority to reconsider *Branch I.* As a

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> general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.
>
> Although *Leatherman* is closely on point, the Court expressly declined to make the extension necessary to undermine *Branch I*. . . . *Branch I* aligns with the majority of other circuits in applying some form of heightened pleading standard in qualified immunity cases. [Citations omitted.]
>
> Like *Branch I*, all of these cases predate *Leatherman*. . . . Although the Supreme Court's rationale – *expressio unius* rule – would appear to apply to *any* case outside the fraud or mistake context in which federal courts have applied heightened pleading rules . . . because the Court specifically refused to "address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit.

Ibid. Thus, in a strict construction of both *Leatherman* and its own first-panel-in-time rule, the Ninth Circuit clearly misconstrued and refused to apply the express language of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure, and refused to apply this Court's rationale in *Leatherman*.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for these reasons:

1. There has been a faulty construction of a federal rule of procedure, and that faulty construction will affect

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pleading in a significant number of *Bivens* and Section 1983 actions, if not every such action;

2. While admitting that this Court's *Leatherman* reasoning and rule "would appear to apply in *any* case," the court below refused to apply it, relying rather on this Court's prior refusal, in *Leatherman,* to reach the issue presented in this Petition; and,

3. The opinion below is at odds with previous assumptions, and will operate to cause serious unwanted assumptions and results, and burden the district courts, appeals courts, and this Court with otherwise unnecessary motions, appeals, and petitions.

Economy, judicial restraint, and the general notion that courts should not reach out to decide issues not presented to them underlie this Court's refusal to address the issue presented in this Petition, in *Leatherman.* 113 S.Ct. at 1162. However, having not opted for the prophylactic mission in *Leatherman,* this Court left unsettled, and open to mischief, the interpretation of the pleading provisions of Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure in an area of law that should receive special consideration by the federal courts: civil rights law. Indeed, as has been the trend in the past decade, federal courts have found a multitude of ways in which to meddle with, mess up, and obstruct plaintiffs' civil rights claims. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (making it easier for civil rights defendants to prevail on the affirmative defense of qualified immunity, and making it more difficult for civil rights plaintiffs to get discovery, pending the outcome of the qualified immunity issue); *Mitchell v. Forsythe,* 472 U.S. 511 (1984) (making denial of qualified immunity immediately appealable, and thus, enabling

civil rights actions to be stayed for significant periods of time until interlocutory qualified immunity appeals are decided); *Parratt v. Taylor*, 451 U.S. 527 (1981) (making the standard of culpability in civil rights cases negligence, but with the same stroke barring civil rights actions in the federal courts in instances in which state law remedies existed); *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986) (both reversing *Parratt* standard of negligence, imposing new, higher standard of culpability, but leaving intact the *Parratt* bar in cases in which state court remedies are available); *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (seemingly permitting qualified immunity to be a defense when it is not raised); *Elder v. Holloway*, 975 F.2d 1388 (9th Cir. 1991),[2] *rehg. denied*, 984 F.2d 991 (9th Cir. 1993), *cert. granted*, 113 S.Ct. 3033 (1993). Civil rights cases should be the darlings and the denizens of the federal courts, and not their pariahs.

What the court below did was to disobey Viscount St. Albans' dictate that "[j]udges ought to remember that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law or give law."[3] The court below *made* the law, but refused to interpret the law. For the same reasons it would have been inappropriate for this Court to have decided the issue presented in this Petition in *Leatherman*, it was wrong for the court below to disregard the clear language of Rules

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[2] The same Ninth Circuit Judge who authored *Elder* also authored the Ninth Circuit opinion in this case of which review is sought.

[3] *The Essays or Counsels Civil and Moral*, Francis Bacon, 1625, No. 56, "Of Judicature."

8(a) and 9(b). By its slavish adherence to its internal procedural first-panel-in-time rule, and its easy willingness to seize upon this Court's failure to reach the issue in this Petition in *Leatherman*, the court below committed an injustice. It threw out the express words, and exclusions of Rules 8(a) and 9(b), and did something that was logically valid but textually unsound, and therefore, absurd. It made true in this case Bacon's adage that "prosperity doth best discover[4] vice." So steeped in "majority of other circuits" authority, its own internal rules, and this Court's prudential recalcitrance to decide issues not before it, the court below followed the Snopsian[5] rigidity that now warrants a clean-up by this Court.

Notwithstanding that this Court declined to decide the larger issue of heightened pleading, *vel non*, in *Leatherman*, it appears clear beyond peradventure that the Court's reasoning and rationale in *Leatherman* are dispositive of the issue on this Petition.

In *Leatherman*, this Court held:

> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain

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[4] *The Essays*, No. 5, "Of Adversity," "discover" – "reveal."

[5] Abner Snopes, in William Faulkner's "The Bear."

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

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statutory construction is applicable equally to the words of Rules 8(a) and 9(b), in this case. Terms that appear in statutory text always should be read and defined in the same way, no matter to what subject they are applied. As in *Ratzlaf*, not only is there no good reason not to apply a single formulation rule of statutory construction to Rules 8(a) and 9(b), but there is no reason in law, logic, or common sense not to apply a single formulation rule. As the First Circuit stated in *U.S. v. Aversa*, 984 F.2d 493, 498 (1st Cir. 1993) (*en banc*), a case cited by this Court in *Ratzlaf* to support its application of the single formulation rule: "[a]scribing various meanings to a single iteration of [a willfulness requirement] – reading the word differently for each code section to which it applies – would open a Pandora's jar. If courts can render meaning so malleable, the usefulness of a single . . . provision for a group of related code sections will be eviscerated. . . . " Here, application of the clear words and requirements of Rules 8(a) and 9(b) in civil rights cases in a way different from their application in all other cases is a clear violation of the principle set forth in *Aversa* and adopted by this Court in *Ratzlaf*. Therefore, it is wrong.

Because of the internal rules of the Ninth Circuit and this Court's declination to decide an issue not before it, notwithstanding the clear words of Rules 8(a) and 9(b), the Ninth Circuit was able to decide petitioners' case in a manner contrary to law, and to create the anomaly that is *Branch v. Tunnell*. This Court must explode that anomaly and order the Ninth Circuit to adhere to the provisions of Rules 8(a) and 9(b).

* * *

Because the affirmative defense of qualified immunity is present in virtually every civil rights case, the mischief caused in this case by the court below is and will be significant. Indeed, what the Ninth Circuit did seems to have been invited by this Court in *Leatherman*.

Leatherman virtually invited the parallax view[7] now espoused by the court below by its paraliptical treatment of the issue now presented in this Petition. In *Leatherman*, this Court spotlighted an issue not before it, and then expressly declined to reach it. This paraliptical peekaboo became the Ninth Circuit's invitation to the anarchical rule of pleading it set forth in this case. Because this Court's seemingly opaque legal paralipsis in *Leatherman* in fact caused a parallax view in this case, this Court should repair that phenomenon. Put another way, by needlessly and unfortunately mentioning the issue addressed in this Petition when it decided *Leatherman*, and then expressly declining to resolve it in *Leatherman*, this Court implicitly invited the incorrect decision in this case, and for that reason this Court should take this case.

* * *

Last, those who insist, quite correctly, that legal decisions follow ordinary language usage, must insist also, to be consistent, that this Petition be granted.

It is a fact that "[o]pportunistic departure from ordinary language in a narrow sense is part of ordinary

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[7] Used here in the archaic sense: the fact of seeing wrongly or in a distorted way.

linguistic behavior[] [and that s]ome departures . . . may be adhered to, thus becoming ordinary language. . . . "[8] Here, there has been an utter disregard for the ordinary language content of Rules 8(a) and 9(b), and the court below has foisted this gross departure on all of the district courts who are bound by its decisions. The clear, unambiguous, ordinary language meaning of the words of Rules 8(a) and 9(b) dictate an opposite result from that reached by the court below.

It follows that because "any philosophical statement which violates ordinary language is false,"[9] any legal statement that violates ordinary language also is false. This is the case because every legal statement is a philosophical statement.

Similarly, it follows that, since "[t]he essence of [the] technique of refuting philosophical statements consists in pointing out that these statements *go against ordinary language*[,]"[10] so too legal pronouncements are refuted if it can be pointed out that they go against ordinary, statutory language. "[O]rdinary language *is* correct language [,]"[11] and, perforce, legal decisions are correct only when they faithfully adhere to the ordinary language of statutes and rules. When a legal decision violates or offends ordinary language usage, it is an incorrect decision.

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[8] Willard Van Orman Quine, *Word and Object*, 1960, pp. 157-58.

[9] Norman Malcolm, "Moore and Ordinary Language," *The Philosophy of G.E. Moore*, Volume IV of the Library of Living Philosophers, ed. P.A. Schlipp, 1942, p. 368.

[10] *Id.* at p. 349 (emphasis in original).

[11] *Id.* at p. 357 (emphasis in original).

The Ninth Circuit's heightened pleading requirement is a paradoxial statement. Because "paradoxical . . . statements should be in the 'language of proposal' rather than in the 'language of assertion[,]"[12] as both the Chief Justice in *Leatherman* recognized when he held that the "result [of heightened pleading] must be obtained by the process of amending the Federal Rules, and not by judicial interpretation[,]" 113 S.Ct. at 1163, and as Bacon sets forth in his "*jus dicere,* and not *jus dare*" rule, *supra,* the Ninth Circuit holding in this case is wrong. It superimposes on ordinary language an odd genus of counter-intuitive rule fetishism that could be found only in law or in a social science, but which would be unlikely to be found in any pure science.

What the court below did proves that "[k]nowing how to operate [in this instance procedurally,] is not knowing how to tell how to operate."[13] Indeed, by knowing well how to operate within its own procedural rules, the court below became unable to and disabled itself from telling how to operate: that is, how to plead. This, too, is a paradox, the one that often is described as the paradox of putting form over substance.

Branch is a paradox, a legal anomoly, in which rules of judicial procedure and construction combined to yield an absurd result that overpowered the clear words of a

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[12] Roderick Chisholm, "Philosophers and Ordinary Language," *The Philosophical Review,* LX, 1951, pp. 317-28 (quoting from Morris Lazerowitz, " Moore's Paradox," *The Philosophy of G.E. Moore, supra,* at p. 391).

[13] Gilbert Ryle, "Ordinary Language," 1953, *The Philosophical Review,* Vol. LXII, p. 9.

legislative act. "*[A]ny* departure from ordinary language [is] anathema [because] ordinary use is *correct use.*[14] So too should any departure from ordinary language of a statute or rule be anathema because such departures are "incorrect use."

The Ninth Circuit, perhaps at the unintended or subliminal invitation of this Court in *Leatherman*, has engrafted onto the provisions of the applicable rules of pleading a foreign, unjustified, and unwanted scion, that now operates, horticulturally speaking, as a poisonous sucker that needs to be excised by this Court.

The Petition for Certiorari should be granted.

Respectfully submitted,

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[14] Grover Maxwell and Herbert Feigl, "Why Ordinary Language Needs Reforming," *The Journal of Philosophy*, LVIII, 1961, pp. 488-98 (commenting on an early view held by Professor Norman Malcolm, see *Malcolm, supra*, pp. 345-68).

APPENDIX A

'Bivens' Complaint Against Method of Obtaining Search Warrant Affidavit Fails to Satisfy Heightened Pleading Standard.

Cite as 94 Daily Journal D.A.R. 442

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY L. BRANCH, VALENNA BRANCH, COLBY BRANCH, *Plaintiffs-Appellants,* v. DALE L. TUNNELL, Individually and as Special Agent of Bureau of Land Management, State of Montana, *Defendant-Appellee.*	No. 93-35144 D.C. No. CV-88-00101-PGH OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, Chief Judge, Presiding

Argued and Submitted
December 15, 1993 – San Francisco, California

Filed January 12, 1994

Before: Donald P. Lay,* David R. Thompson, and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer

---

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

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OPINION

RYMER, Circuit Judge:

Three years ago, we reversed the district court's holding that the *Bivens'* complaint filed by plaintiffs Jerry L. Branch and his daughters Valenna and Colby Branch (collectively, Branch) could survive a motion to dismiss premised on the defense of qualified immunity, *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (*Branch I*). Branch alleged that defendant Dale L. Tunnell, a Special Agent with the Interior Department's Bureau of Land Management (BLM), violated Branch's Fourth Amendment rights by knowingly or recklessly misleading the magistrate judge in an affidavit for warrants to search Branch's home and business. We held that a district court must apply a "heightened pleading standard" in *Bivens* or § 1983 cases where the defendant's subjective intent is an element of the plaintiff's constitutional tort. *Id.* at 1386.

In the interim, several events of note have taken place. Branch returned to the district court and filed an amended complaint, which Tunnell met with another

motion to dismiss. The district court granted the motion, finding that Branch had failed to allege specific facts tending to show that Tunnell either knew or should have known of allegedly false statements in the affidavit. After the district court issued its ruling, the Supreme Court, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S.Ct. 1160 (1993), held that a federal court may *not* apply a heightened pleading standard to a complaint alleging municipal liability under § 1983.

Branch appeals, arguing that the district court erred in applying the heightened pleading standard, and that even if the district court applied that standard correctly, we must overrule *Branch I* in light of *Leatherman*. We disagree with Branch on both counts. Branch's amended complaint fails to meet the standard we articulated in *Branch I*. Because the Court in *Leatherman* expressly stated it was not deciding whether federal courts may employ a heightened pleading standard in qualified immunity cases, we are bound by our holding in *Branch I*. We have jurisdiction, 28 U.S.C. § 1291, and we affirm the district court's judgment.

I

In 1986, the Montana Department of Revenue (MDOR) audited various oil and gas field operators to determine whether they were paying the proper amount of production taxes to the State. Among the entities MDOR audited was Branch Oil and Gas (Branch Oil); Branch is the president of Branch Oil, and he owns 50% of the corporation's stock.

After conducting these audits, MDOR requested internal records from companies that purchased natural gas from the field operators. On May 29, 1987, MDOR lodged such a request with Aloe Ventures Gathering System (Aloe Ventures), a joint venture in which Branch Oil is the managing partner and owns a 42.95% interest, and which purchases gas from Branch Oil. A dispute arose concerning the scope of MDOR's request. Citing confidentiality provisions in certain of its records, Aloe Ventures asked MDOR to explain the relevance of the items requested.

In April 1987, Tunnell began investigating whether Branch and Branch Oil were avoiding royalty payments on federal natural gas leases. Pursuant to the Mineral Leasing Act (Act). 30 U.S.C. §§ 181-287, the Secretary of the Interior leases federal oil and gas reserves to private parties such as Branch Oil. In exchange for its lease, the private party pays to the federal government a royalty; the royalty is calculated according to the price the private party receives from its purchasers for the oil or gas it extracts. The Secretary has broad powers to audit and investigate lessees to ensure compliance with the Act's royalty provisions. *Id.* §§ 1711(a), 1717(a). The State (vis-a-vis MDOR) calculates its tax on oil and gas producers in a similar manner.

Before investigating Branch Oil, Tunnell had been involved in the investigation of an entity known as Western Reserves, Inc. The BLM suspected that Western Reserves had set up a shell corporation and sold to it natural gas at a below-market price, thereby yielding lower royalty and tax calculations. The Western Reserves

investigation eventually led to the filing of criminal charges.

Tunnell suspected that the Branch Oil-Aloe Ventures arrangement was similar to the unlawful operation he's investigated at Western Reserves. Specifically, Tunnell believed that Branch Oil and Aloe Ventures negotiated for the price of gas in a less-than-arms-length transaction, that Branch Oil would underprice the gas it sold to Aloe Ventures, and that Aloe Ventures, in turn, would resell the gas to other purchasers at a significantly higher price. Tunnell believed that the Aloe Ventures profit yield included income upon which Branch Oil's federal lease royalties should have been calculated. At some point during his investigation, Tunnell learned from MDOR officials of the ongoing dispute between MDOR and Aloe Ventures concerning the document request.

On July 15, 1987, Tunnell filed with a United States magistrate judge an application for warrants to search Branch's home and place of business. Tunnell's four-page warrant affidavit set forth the evidence he claimed to have obtained in the course of investigating the alleged royalty-evasion scheme. Tunnell attributed much of the information in his affidavit to Peter Donnelly, a revenue agent with MDOR. The magistrate judge issued the warrants, and federal agents executed them on the following day, July 16, 1987. Neither federal nor state authorities ever filed criminal charges against Branch, Branch Oil, or Aloe Ventures.

Branch filed this *Bivens* action on June 22, 1988, alleging a violation of his Fourth Amendment right to be free from unreasonable searches. Branch alleged a conspiracy

between the BLM and MDOR to obtain the documents that Aloe Ventures refused to produce: Branch further alleged that Tunnell's warrant affidavit was a mere pretext to secure those documents. Tunnell thereafter moved to dismiss the complaint on the ground that Branch's complaint failed to overcome Tunnell's qualified immunity. The district court denied the motion, and Tunnell appealed.

We reversed and remanded. Following the lead of the District of Columbia Circuit, *see, e.g., Siegert v. Gilley*, 895 F.2d 797, 801-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), we adopted a "heightened pleading standard" for *Bivens* and § 1983 cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort.

> [I]n order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity.

Branch I, 937 F.2d at 1386 (quotation marks omitted). In the context of Branch's claim that Tunnell had deceived the magistrate judge in the course of obtaining the warrants, we held that this new standard obligated Branch to point to specific portions of the affidavit that Branch alleged were false; to allege "some facts" showing that Tunnell was aware (or should have been aware) of those statements' falsity; and to allege that the statements were

necessary to the magistrate judge's probable cause finding. *Id.* at 1387. We determined that Branch's complaint fell short of this mark and therefore remanded the case to the district court so Branch could amend the complaint in conformity with the new standard. *Id.* at 1388.

Branch then filed an amended complaint. This complaint identifies 11 alleged falsehoods in Tunnell's affidavit, and lists seven facts that, according to Branch, demonstrate that Tunnell knew or should have known that those statements were false. Branch also alleges that those false statements were necessary to the magistrate judge's finding of probable cause to issue the warrants.

Tunnell moved to dismiss the amended complaint, arguing that Branch had failed to meet the heightened pleading standard. The district court granted the motion, holding that, although Branch met the first prong of the *Branch I* test by listing specific falsehoods in Tunnell's warrant affidavit, he failed to allege facts showing that Tunnell knew or should have known the statements were false. Branch filed this timely appeal.

II

We consider first Branch's argument that his complaint was sufficient to survive *Branch I's* heightened pleading standard. At bottom, Branch's constitutional claim is that Tunnell deceived the magistrate judge in procuring the search warrants. In *Branch I*, we held that the heightened pleading standard requires a plaintiff bringing such a claim to satisfy three requirements:

> [A] plaintiff's complaint must contain nonconclusory allegations that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. That is, he must [1] 'point out specifically the portion of the warrant affidavit that is claimed to be false,' and [2] allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements. [3] He must also allege that the false statements were 'necessary to the finding of probable cause,' but without the particularity required of his allegations regarding the defendant's state of mind.

937 F.2d at 1387 (citations omitted) (quoting *Franks v. Delaware*, 438 U.S. 154, 156, 171 (1978)).

The district court held that, although Branch met the first of these requirements by identifying particular statements in Tunnell's affidavit that Branch claims were false, he failed to clear the second hurdle. The district court separated into two categories Branch's allegations of Tunnell's awareness of (or reckless disregard for) the statements' falsity: (1) that Tunnell created the false impression that he had more experience in the investigation of royalty-underpayment schemes than he actually did, and (2) that Tunnell misrepresented to the magistrate judge in formation that he claimed to have received from Donnolly. The district court held that the first set of allegations did not in any way suggest that Tunnell was aware of (or recklessly disregarded) the purportedly false statements in his affidavit, and that the second set of allegations were undercut by statements in Donnelly's deposition testimony.

Reviewing the matter de novo, *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 113 S. Ct. 655 (1992), we conclude that the district court was correct.

A

Tunnell argues that, whereas his warrant affidavit was specific and detailed, Branch has pointed only to full sentences or paragraphs (each of which contains numerous factual statements) and alleged they were false. Tunnell insists that the first *Branch I* factor requires greater specificity. This argument fails.

While Branch does allege the wholesale falsity of some paragraphs in the Tunnell affidavit, *Branch I* doesn't require anything more. we said only that a plaintiff must identify the specific "portion of the warrant affidavit that is claimed to be false," 937 F.2d at 1387 (quotation marks omitted), not that a plaintiff must identify which words or phrases are allegedly false.

B

Branch argues ¶ 17 of the amended complaint includes seven allegations which tend to show that Tunnell knew or should have known that many statements in his warrant affidavit were false. We agree with the district court's conclusion that these allegations fail to satisfy the second requirement of the *Branch I* standard. We first address a threshold issue concerning the documents the district court considered in resolving this question, and then turn to the various allegations contained in ¶ 17 of the amended complaint.

1

Paragraph 17 refers to, but Branch did not attach to his amended complaint, two documents generated prior to the district court's ruling on Tunnell's initial motion to dismiss. The first of these is Donnelly's deposition testimony, which, according to the amended complaint, contradicts the statements Tunnell attributed to Donnelly in the warrant affidavit; the second is a 1989 affidavit executed by Tunnell. The district court noted that the deposition transcript was not attached to the amended complaint, but nevertheless treated the transcript as part of the pleading for purposes of deciding Tunnell's motion to dismiss.[2]

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). When "matters outside the pleading are presented to and not excluded by the court," a Rule 12(b)(6) motion is to "be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). "However, material which is properly submitted *as part of the complaint* may be considered" on a motion to dismiss, *Hall Roach Studios*, 896 F.2d at 1555 n.19 (emphasis added).

We have said that a document is not "outside" the complaint if the complaint specifically refers to the document and if its authenticity is not questioned. *Townsend v. Columbia Operations*, 667 F.2d 844, 848-49 (9th Cir. 1982).

The leading commentators state that "when [the] plaintiff fails to introduce a pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327, at 762-63 (2d ed. 1990); *accord Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991). We have previously indicated approval of this rule, but have not explicitly adopted it. *See, e.g., In re VeriFone Sec. Litig.*, No. 92-15156, slip op. at 12962 n.2 (9th Cir. Nov. 17, 1993). As it makes sense and comports with existing practice, we hold that documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss. Such consideration does "not convert the motion to dismiss into a motion for summary judgment." *Romani*, 929 F.2d at 879 n.3.

Neither side questions the authenticity of the Donnelly deposition or the 1989 Tunnell affidavit, and both documents are expressly mentioned in the amended complaint. The district court did not err in considering either document.

2

We turn no to the crux of the controversy: whether the allegations in ¶ 17 meet the second *Branch I* requirement. We agree with the district court that they do not.

The amended complaint first alleges that Donnelly, in his deposition, said that many of the statements Tunnell attributed to him in the warrant affidavit were either

inaccurate or never made at all. The differences that Branch points to, however, are trivial. For example, Tunnell stated in the warrant affidavit that Donnelly informed him of possible violations of 18 U.S.C. § 1001 by Branch Oil. Donnelly testified that, although he advised Tunnell of specific facts uncovered during the MDOR audit of Branch Oil, he wasn't familiar with § 1001. Donnelly's lack of familiarity with federal criminal statutes does not show that Tunnell lied about Donnelly's information; it shows only that Tunnell, a *federal* official, might have recognized that federal statutes were implicated on the basis of facts relayed to him by Donnelly, a *state* official. Indeed, Donnelly's testimony confirms that Tunnell did mention certain federal criminal statutes to him and that those statutes had no meaning to Donnelly.[3] Because nothing in the Donnelly deposition suggests that Tunnell knew or should have known that statements in his warrant affidavit were false,[4] we agree with the district court that the allegations centered on the Donnelly deposition do not satisfy *Branch I's* second requirement.

The amended complaint next alleges that Tunnell, in his 1989 affidavit contradicted or retreated from many statements he made in the warrant affidavit. Again, the purported "discrepancies" are not substantial. Tunnell stated in the warrant affidavit that Branch Oil was responsible for taxes and royalties on "approximately 24 leases" in an amount exceeding $500,000. The alleged "retreat" is Tunnell's assertion in 1989 that Branch Oil "owned an interest" in (as opposed to owned outright) the 24 leases. As there is no indication that a partial-interest owner bears no responsibility for these tax obligations, the "difference" between Branch Oil owning 24

leases as opposed to owning an interest in those leases does not undercut the veracity of Tunnell's representations to the magistrate judge.

The amended complaint's next allegation concerns Tunnell's purported lack of experience as a federal agent. Branch claims that Tunnell knowingly lied to the magistrate judge about the breadth of his experience as a law enforcement official. The warrant affidavit, which Tunnell executed on July 15, 1987, states that Tunnell had been employed with the BLM since May 5, 1986. Tunnell stated that he had been involved in law enforcement for the previous 17 years, and that during that time he had participated in criminal investigations of individuals, partnerships, and corporations. Branch points to no facts indicating that these representations were false.

The amended complaint next alleges that Tunnell's representations to the magistrate judge concerning the similarities between the Branch Oil-Aloe Ventures and Western Reserves cases ignored clear differences between the two. The only fact that the amended complaint alleges to support this assertion is that, according to MDOR records, Aloe Ventures purchased a third of its gas from operators who owned no interest in the joint venture. Tunnell, however, did not represent that the two cases were identical; rather he stated there were "substantial similarities" between the cases.

The amended complaint also alleges that Tunnell's representations to the magistrate judge that Branch Oil and Aloe Ventures shared a common business address and telephone number were knowingly false (or made with reckless disregard of their truth or falsity), since the

Shelby, Montana telephone directory contained separate listings for the two entities. Tunnell's representations did not concern the telephone directory. Instead, Tunnell informed the magistrate judge that each companies' *letterhead* listed the same address and phone number, and that the Toole County Assessor's Office also listed identical information for the two businesses.

The amended complaint's final allegation is that Tunnell admitted in his warrant affidavit that many gas producers form limited partnerships for the legitimate purpose of converting the gas to a marketable condition for sale to end purchasers. The fact that Tunnell was aware of legitimate dealings, however, does not suggest that he knowingly lied to (or recklessly misled) the magistrate judge concerning the nature of the Branch Oil-Aloe Ventures relationship.

We therefore hold that the allegations in § 17 of Branch's amended complaint fail to show that Tunnell knew or should have known he was making false statements to the magistrate judge, and that the amended complaint fails to satisfy *Branch I's* heightened pleading standard.

III

Having concluded that the amended complaint fails to satisfy the requirements of *Branch I*, we must consider Branch's argument that we should overrule that opinion in light of *Leatherman*. We agree with Branch that if his amended complaint is reviewed under the familiar standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed for failure to state a claim

"unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), that pleading suffices for Rule 12(b)(6) purposes. We disagree, however, that we are free to revisit *Branch I* in light of *Leatherman*.

In *Leatherman*, the Court rejected the Fifth Circuit's heightened pleading standard in cases alleging municipal liability under § 1983. The case arose out of complaints filed against two municipalities for their officers' forcible entry into residences the officers suspected were fronts for drug-manufacturing operations. The district court and the Fifth Circuit, both applying the latter's heightened pleading standard in civil rights cases, held that the complaints should be dismissed. The Supreme Court reversed.

The Court found it "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit- . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 113 S.Ct. at 1163. The Court observed that Rule 9(b) imposes a requirement of particularity with respect to averments of fraud or mistake relying on the canon of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the Court determined that a heightened pleading rule – at least in cases alleging municipal liability under § 1983 – "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation, in the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritious claims sooner rather than later." *Id.*

At the same time, the Court specifically reserved judgment on the question whether its "qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 1162. The *Leatherman* defendant had defended the heightened pleading standard on the ground "that a more relaxed pleading requirement would subject municipalities to expensive and time consuming discovery in every § 1983 case, eviscerating their immunity from suit and disrupting municipal functions." *Id.* The Court rejected this argument, noting that municipalities – *unlike individuals* sued under § 1983 – do *not* have immunity (either absolute or qualified) from suit. *Id.* (citing *Owens v. City of Independence*, 445 U.S. 622, 650 (1980)).

Because of the Court's caveat, we lack the authority to reconsider *Branch I*. "As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel," *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.), *cert. denied*, 113 S. Ct. 359 (1992). "An exception to this rule arises when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point." *Id.* (quotation marks omitted).

Although *Leatherman* is closely on point, the Court expressly declined to make the extension necessary to undermine *Branch I:* The Court cordoned off the question whether a heightened pleading standard might be justified in an action against an individual officer. We also cannot say that the Court's qualified immunity jurisprudence would not call for application of the heightened pleading rule in such a case.[5] *Branch I* aligns us with the majority of other circuits in applying some form of a

heightened pleading standard in qualified immunity cases. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, *and cert denied*, 112 S. Ct. 1242 (1992); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763 (4th Cir. 1990); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989), *cert denied*, 493 U.S. 1088 (1990); *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

Like *Branch I*, all of these cases predate *Leatherman*. The majority of a three-judge panel of the District of Columbia Circuit recently concluded that *Leatherman* did not give it license to disturb that circuit's heightened pleading standard in qualified immunity cases, *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993). Although the Supreme Court's rationale – the *expressio unius* rule – would appear to apply in *any* case outside the fraud or mistake context in which federal courts have applied heightened pleading rules, *see id.* at 799, 804 (Edward J., dissenting), we agree with the District of Columbia Circuit that because the Court specifically refused to "address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit." *Id.* at 794 n.9.

We are bound to follow *Branch I*. Doing so requires that we affirm the judgment of the district court.

AFFIRMED.

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Branch did attach a copy of Tunnell's warrant affidavit.

[3] Branch also argues that, whereas Tunnell's warrant affidavit included the statement that MDOR had estimated that Branch Oil was responsible for more than $500,000 in unpaid state and federal taxes, Donnelly denied making such a statement. In fact, Donnelly testified that he wouldn't have given Tunnell "a federal tax number" because he, Donnelly, wouldn't have known how to calculate Branch Oil's federal tax liability. Nor did Donnelly deny telling Tunnell that his estimate was around $500,000, rather, he stated only that he couldn't recall making such an estimate.

[4] If anything, the Donnelly deposition *supports* the warrant affidavit. The warrant affidavit states that an MDOR audit disclosed that, with respect to one federal lease, Branch Oil had unpaid royalties over a three-year period totaling $13,713.05. Donnelly testified that he provided Tunnell with that exact figure. The amended complaint alleges that this concurrence between the deposition and the warrant affidavit is irrelevant, given that Branch Oil and MDOR were involved in an ongoing and open dispute over the proper method for calculating royalty payments. The existence of that dispute, however, does not call into question the veracity of Tunnell's representations to the magistrate judge.

[5] The illegible Court in *Leatherman* included one Justice who has expressly endorsed the heightened pleading standard in qualified immunity cases, and two Justices who joined an opinion ending for a pleading standard with illegible. *See Siegert v. Gilley*, 111 S.Ct. 1789, 1795 (1991) (Kennedy, J., concurring):

> The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter. There is tension between the illegible of *Harlow* and the requirement of malice, and it seems to

> me that the heightened pleading requirement is the most workable means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and illegible also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

(citation omitted); *id.* at 1801 (Marshall J., joined by Blackmun and Stevens, JJ., dissenting) ("[A] plaintiff pleading a *Bivens* claim that requires proof of the defendant's intent should be afforded [appropriately tailored] discovery whenever the plaintiff has gone beyond here, conclusory allegations of unconstitutional purpose.").

APPENDIX B

Jerry L. BRANCH, Sylvia Branch, Colby Branch, Plaintiffs-Appellees.

v.

Dale L. TUNNELL, Individually and as special Agent of Bureau of Land Management, State of Montana, John D. LaFaver, Individually and as Director of Revenue, Peter Donnelly, Individually and as Revenue Agent for Montana Department of Revenue, Joe Doe I, Individually and as employee of Montana Department of Revenue, Defendants-Appellants.

No. 89-35383.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 5, 1990.

Decided June 27, 1991.

Person whose home and office were searched as part of government investigation brought *Bivens* action against government agent who executed warrant affidavit. The United States District Court for the District of Montana, Paul G. Hatfield, J., denied motion to dismiss on qualified immunity grounds, and agent appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) where subjective intent was element of action, it was necessary for complaint to state non-conclusory allegations setting forth evidence of unlawful intent; (2) such heightened pleading standard would be satisfied with circumstantial or direct evidence; (3) heightened pleading standard applied in instant case; and (4) person's complaint failed to adequately allege

violation of clearly established Fourth Amendment rights.

Reversed and remanded.

Ann Southworth, U.S. Dept. of Justice, Washington D.C., for defendants-appellants.

Robert J. Waller, Veeder & Broeder, Billings, Mont., for plaintiffs-appellees.

Before HALL THOMPSON and LEAVY, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Dale L. Tunnell, a special Agent of the Bureau of Land Management ("BLM"), appeals the denial of his motion to dismiss a *Bivens* action on grounds of qualified immunity. The district court had jurisdiction under 28 U.S.C. § 1343. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). We reverse.

I

In early 1987, Special Agent Tunnell began investigating whether Jerry L. Branch, a Shelby Montana businessman, was avoiding royalty payments on federal natural

gas leases.[1] Branch was the president and controlling interest owner of Branch Oil and Gas Company ("Branch Oil"). At the time, Branch Oil sold the gas produced from its federal leases to Aloe Ventures Gathering System ("Aloe Ventures"), joint venture in which Branch Oil owned a 42.95% interest. During the course of his investigation, Tunnell came to suspect that this was not an arm's length relationship and that the price at which Branch Oil sold its gas to Aloe Ventures (and from which its federal royalty payment was based) was below-market. He believed that Aloe Ventures, which he suspected was effectively controlled by Branch, was in turn selling the gas to the Montana Power Company at a higher price.

Tunnell then sought and obtained warrants from a United States magistrate to search Branch's home and office. He submitted a four-page, single-spaced affidavit in support of his warrant application, setting out in some detail the evidence he had obtained about the alleged royalty evasion scheme. The affidavit attributed a good portion of this information to Peter Donnelly, a revenue agent employed by the Montana Department of Revenue. The warrants were executed on July 16, 1987. No criminal charges were filed against Branch after his home and office were searched.

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[1] The Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1988), authorizes the Secretary of the Interior to grant federal oil and gas leases to private parties. The Secretary is charged with establishing an auditing and accounting system to assure accurate reporting and payment of royalties from these leases, *id* § 1711(a), and possesses broad investigative powers, *id.* § 1717(a). It was under this authority that Tunnell investigated Branch.

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provided by Defendant Donnelly, *Defendant Tunnell included other information in his Affidavit which he knew or should have known was false.*

. . . .

24. The Search Warrant issued by the U.S. Magistrate Dirk Larsen was void because *much of the information set forth in the Application and Affidavit in Support of Search Warrant filed by Defendant Dale L. Tunnell is false and unsubstantiated.*

On October 3, 1988, Tunnell moved to dismiss Branch's suit on grounds of qualified immunity, arguing that under the objective qualified immunity standard established by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 72 L.Ed.2d 396 (1982), Branch had failed to allege sufficient facts to establish a violation of a statutory or constitutional right. The district court, which had allowed Branch to depose Donnelly and LaFaver, over Tunnell's objections, stayed further discovery while the motion to dismiss was under consideration. On December 2, 1988, the court denied Tunnell's motion. Relying on *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the court concluded that "[t]he defense of qualified immunity usually turns on the circumstances and motivations of the defendant and, therefore, ordinarily cannot support the grant of a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted. . . . Because there exists genuine issues of material fact regarding Tunnel's [sic] claim of qualified immunity, the court is constrained to deny the motion to dismiss."

On December 9, 1988, Tunnell moved for reconsideration and a continued stay of discovery pending a ruling on that motion. The court granted the stay on December 12. On January 17, 1989, before the court ruled on his motion for reconsideration, Tunnell filed a motion for summary judgment, again arguing that Branch had failed to allege sufficient facts to defeat his qualified immunity defense.

On April 11, 1989, the district court denied Tunnell's motion for reconsideration, but took his motion for summary judgment under advisement, announcing its intention to allow discovery to proceed before issuing a ruling.[5] The court did not narrow or otherwise restrict the scope of discovery. Tunnell timely appealed from the denial of his motion for reconsideration, and the district court stayed all proceedings pending the outcome of this appeal.

II

We review de novo the denial of a qualified immunity defense. *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir.1989); *Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir.1988), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 2087, 104 L.Ed.2d 650 (1989).

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[5] Tunnell has focused his argument on appeal on the court's decision to take his motion for summary judgment under advisement. He characterizes that decision as an "effective denial" of his summary judgment motion, and urges us to treat it as such. Because we reverse the district court's denial of his earlier motion to dismiss, we need not address these arguments or our jurisdiction to entertain them.

III

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), the Supreme Court held that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under this standard, the focus of the inquiry generally is on the "objective reasonableness" of the official's conduct as measured by reference to "clearly established law." *See, e.g., id; Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Mills v. Graves*, 930 F.2d 729, 731 (9th Cir.1991); *Floyd v. Laws*, 929 F.2d 1390, 1393 (9th Cir.1991); *Ortiz v. Van Auken*, 887 F.2d 1366, 1368 (9th Cir.1989).

By shifting the focus of the qualified immunity inquiry to an objective standard,[6] The *Harlow* Court sought to shield government officials from the substantial costs that attend "[j]udicial inquiry into subjective motivation," particularly "broad-ranging discovery and the deposing of numerous persons." 457 U.S. at 817, 102 S.Ct. at 2737. After *Harlow*, "bare allegations of malice" are insufficient to subject government officials either to the costs of trial or the burdens of discovery. *Id.* at 817-18, 102 S.Ct. at 2738. *Harlow* requires district courts to dismiss such "insubstantial" lawsuits at the earliest possible stage of a lawsuit.

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[6] Prior to *Harlow* the qualified immunity test had consisted of both objective and subjective elements. *See Harlow*, 457 U.S. at 815, 102 S.Ct. at 2736; *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975).

A

There is a tension, however, between *Harlow's* emphasis on "objective reasonableness" and cases in which the "clearly established law" at issue contains a subjective element, such as motive or intent. While the Supreme Court has yet to rule on how *Harlow* should be applied in those cases,[7] a number of circuits have held that *Harlow* does not preclude consideration of subjective factors (unrelated to knowledge of the law) in assessing a defendant's entitlement to qualified immunity. *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir.1990, *aff'd on other grounds*, ___ U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 648 (10th Cir.1988); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir.1988); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir.1984), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2141, 85 L.Ed.2d 498 (1985); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir.1984).

The District of Columbia Circuit, mindful of *Harlow's* concerns about the cost of judicial inquiry into subjective

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[7] The Court recently granted certiorari in *Siegert v. Gilley*, 895 F.2d 797 (D.C.Cir.1990), a case in which subjective motivation was an element of the alleged constitutional violation. Under District of Columbia Circuit precedent, the plaintiff was allowed to plead that the defendant had acted with an unconstitutional motive but was required to conform to that Circuit's heightened pleading standard. The Court affirmed without discussing the interplay between *Harlow* and subjective intent as an element of the constitutional violation, concluding that the plaintiff failed to allege the violation of a clearly established right. ___ U.S. ___, ___-___, 111 S.Ct. 1789, 1792-96, 114 L.Ed.2d 277 (1991).

motivation, has adopted a heightened pleading standard in cases in which subjective intent is an element of the alleged constitutional tort. *Siegert*, 895 F.2d at 801-02; *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990); *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir.1987); *Smith v. Nixon*, 807 F.2d 197, 200 (D.C.Cir.1986); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985). This heightened pleading standard assures that "[b]are allegations of improper purpose, like the bare allegations of malice rejected in *Harlow*, do not suffice to drag officials into the mire of discovery." *Smith*, 807 F.2d at 200 (citations omitted).[8] Under that standard

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[8] While a majority of the Supreme Court in *Siegert* did not reach the issue, four members of the Court expressed approval for some form of heightened pleading standard when subjective intent is an element of the constitutional violation at issue. *See* ___ U.S. at ___, 111 S.Ct. at 1794 (Kennedy, J., concurring in the judgment); *id.* at ___, 111 S.Ct. at 1800 (Marshall, Blackmun, and Stevens, JJ., dissenting in part). As Justice Kennedy noted,

> The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity as a general matter. There is a tension between the rationale of *Harlow* and the requirement of malice, and its seems to me that the heightened pleading requirement is the most workable means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standards for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the qualified immunity doctrine, and it is no

plaintiffs must include in their complaint nonconclusory allegations containing evidence of unlawful intent or face dismissal prior to the taking of any discovery. *Whitacre*, 890 F.2d at 1171; *Hobson*, 737 F.2d at 29. Those allegations must "constitute direct as opposed to merely circumstantial evidence of the intent." *Siegert*, 895 F.2d at 802.

Like the District of Columbia Circuit, we conclude that bare allegations of improper purpose are insufficient to subject government officials to discovery and the related burdens of defending a lawsuit. We therefore adopt a heightened pleading standard in cases in which subjective intent is an element of a constitutional tort action. We hold that in order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. "The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Whitacre*, 890 F.2d at 1171.

We disagree, however, with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial, evidence. *Siegert*, 895 F.2d at 801-02. While a majority of the Supreme Court, in affirming the judgment in *Siegert*, did not rule on the propriety of a heightened pleading standard, *see supra* note 8, we note that the four

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> answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Id. at ___, 111 S.Ct. at 1795 (citation omitted).

members of the court that did expressly reject the District of Columbia Circuit's direct evidence requirement. *Siegert v. Gilley*, ___ U.S. ___, ___, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (Kennedy, J., concurring in the judgment); *id.* at ___, 111 S.Ct. at ___ (Marshall Blackmun, and Stevens, JJ., dissenting in part), (1991). Because evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal. We believe a requirement that a plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct *or* circumstantial evidence, before discovery may be had, satisfies *Harlow's* directive that government officials should be shielded from "insubstantial" lawsuits, while at the same time preserving the opportunity for plaintiffs to pursue meritorious claims. *See Krohn*, 742 F.2d at 31. Once a plaintiff has met this threshold requirement, the district court may, if it believes discovery is warranted, allow the plaintiff to engage in narrowly tailored discovery, supervising the discovery process to avoid imposing unnecessary burdens upon the defendants. *See Anderson*, 483 U.S. at 646 n. 6, 107 S.Ct. at 3042 n. 6 (1987); *Krohn*, 742 F.2d at 31-32.

B

We now turn to whether a heightened pleading standard is warranted in this case.

Branch alleges that Tunnell violated his fourth amendment rights by deliberately or recklessly misleading the magistrate to obtain the warrants with which he

searched his home and office. In a criminal proceeding, a defendant challenging the veracity of a warrant affidavit is entitled to an evidentiary hearing only if he makes a "substantial preliminary showing" that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and that "the allegedly false statement is necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978). The *Franks* standard, although developed in the criminal context, "also defines the scope of qualified immunity in civil rights actions." *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir.1991); *see also Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 n. 3 (9th Cir. 1990). Thus, "[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statement, . . . he cannot be said to have acted in an objectively reasonable manner," and the shield of qualified immunity is lost. *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir.1985) (citing *Franks*) (footnote omitted).

Because a defendant's entitlement to qualified immunity in a *Bivens* or § 1983 action alleging judicial deception turns on the ability of the plaintiff to establish that the defendant knowingly or recklessly misled the magistrate, *see Rivera*, 928 F.2d at 604; *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir.1990); *Myers v. Morris*, 810 F.2d 1437, 1457-58 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *Perlman v. City of Chicago*, 801 F.2d 262, 264-65 (7th Cir.1986, *cert. denied*, 480 U.S. 906, 107

S.Ct. 1349, 94 L.Ed.2d 520 (1987); *Olson*, 771 F.2d at 281; *Krohn*, 742 F.2d at 31-32, we find that the heightened pleading standard must be satisfied.

Applying that standard to a claim of judicial deception, we conclude that a plaintiff's complaint must contain nonconclusory allegations that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. That is, he must "point out specifically the portion of the warrant affidavit that is claimed to be false," *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684, and allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements. He must also allege that the false statements were "necessary to the finding of probable cause," *id.* at 156, 98 S.Ct. at 2676, but without the particularity required of his allegations regarding the defendant's state of mind.

We hasten to add that this standard is a low one. It serves the limited purpose of enabling the district court to dismiss "insubstantial" suits prior to discovery and allowing the defendant to prepare an appropriate response. It should be distinguished from the standard at summary judgment, where a plaintiff alleging judicial deception "must make a substantial showing of deliberate falsehood or reckless disregard for truth" and "establish that, but for the dishonesty, the challenged action would not have occurred." *Snell*, 920 F.2d at 698; *see also Myers*, 810 F.2d at 1458; *Perlman*, 801 F.2d at 264-65; *Krohn*, 742 F.2d at 31-32.

C

Under this heightened pleading standard, we conclude that Branch's complaint fails adequately to allege a violation of clearly established rights under *Franks*. Branch makes no effort to identify which allegations in Tunnell's lengthy warrant affidavit he challenges as untrue. His complaint contains no specific affirmative allegation of dishonesty or reckless disregard for the truth. It makes only a single allegation that, in addition to the false information supplied by Donnelly, Tunnell included other, unspecified information which he "knew or should have known" was false. No facts are recited which would indicate that Tunnell actually believed Branch to be innocent of wrongdoing or that he had reason to know that Donnelly would knowingly provide him with false information. Indeed, Tunnell is only a minor player in the conspiracy described in Branch's complaint. This conclusory assertion, unsupported by any specific factual allegations, is insufficient to allege a violation of rights under the heightened pleading standard we adopt today.

IV

For the foregoing reasons, we REVERSE the district court's denial of Tunnell's motion to dismiss and REMAND to the district court. Because we adopt a new heightened pleading standard in this case, the district court should allow the plaintiffs an opportunity to amend their complaint.